1994

America First Credit Union v. First Security Bank of Utah, Renaissance Exchange, Inc., Don Newsom : Reply Brief

Utah Court of Appeals

COURT OF APPEALS

FOR THE STATE OF UTAH

AMERICA FIRST CREDIT UNION, a Utah Corporation	:	
Plaintiff and Appellee,	:	Case No. 940483-CA
v.	:	
FIRST SECURITY BANK OF UTAH, N.A.	:	
Defendant and Appellant,	:	Priority No. 15
RENAISSANCE EXCHANGE, INC. and DON NEWSOM,	:	
Third-Party Defendants.	:	

REPLY BRIEF OF APPELLANTS

Appeal from a Judgment of the Second Judicial District Court in and for Weber County, Honorable W. Brent West, District Judge.

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Defendant and appellant First Security Bank of Utah, N.A. ("First Security") respectfully submits this reply brief in response to the arguments stated in the brief submitted by plaintiff and appellee America First Credit Union (the "Credit Union").

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DETERMINATIVE STATUTORY PROVISIONS

I. Utah Code Ann. § 70A-9-106:

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

II. Utah Code Ann. § 70A-9-203(1):

(1) Subject to the provisions of Section 70A-4-208 on the security interest of a collecting bank, Section 70A-8-321 on security interests in securities, and Section 70A-9-113 on a security interest arising under the chapter on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;

(b) value has been given; and

(c) the debtor has rights in the collateral.

III. Utah Code Ann. § 70A-9-318(3):

> (3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

REQUEST FOR ORAL ARGUMENT AND FULL OPINION

As is made clear in First Security's briefs, several courts have ruled on the principal issue presented to this court for decision. Although Utah law is consistent with the position taken by these other courts, it is not clear and explicit. For planning purposes in the area of secured transactions, it would be helpful to have a clear holding on the issue of the requirements of Utah Code Ann. §70A-9-318(3). For this reason, First Security respectfully requests that the Court issue a fully reasoned opinion in this case.

For the same reason, First Security requests oral argument to assist the Court in the decision process.

ARGUMENT

I. THE CREDIT UNION HAS FAILED TO SHOW THAT ITS PURPORTED NOTICE MEETS THE REQUIREMENTS OF SECTION 70A-9-318(3).

The Credit Union has failed to show that its notice of assignment adequately met the requirements of Utah Code Ann. § 70A-9-318(3). Section 318(3) provides as follows:

> (3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

The cases consistently hold that section 318(3) requires that the account debtor be notified both that the account has been assigned and that payment is to be made to the assignee. City of North Miami v. American Fidelity Fire Ins. Co., 505 So.2d 511 (Fla. App. 1987); Union Investment, Inc. v. Midland-Guardian Co., 30 Ohio App. 3d 59, 506 N.E.2d 271 (1986); Vacura v. Haar's Equipment, Inc., 364 N.W.2d 387 (Minn. 1985); First Trust & Savings Bank v. Skokie Fed. Savings and Loan Assoc., 126 Ill. App. 3d 42, 466 N.E.2d 1048 (1984). Failing such notice, the account debtor may pay the account creditor.

In this case, the notice provided by the Credit Union stated as follows:

ASSIGNMENT OF SAVINGS CERTIFICATE

We are holding as collateral on a Line of Credit Savings Certificate No. 984993 in the Amount of $99,999.00, in the name of Renaissance Exchange. Renaissance Exchange Inc. is willing to pledge this certificate as collateral on their loan with America First Credit Union.

Renaissance Exchange, Inc.

By:/s/_____
Title

American First Credit Union is holding the original certificate as collateral. We would appreciate your acknowledgement of the Assignment, also confirming the balance of $99,999.00. This Assignment will be in effect until you have received written notice of our release of the Assignment. Please acknowledge the Assignment and the balance by signing below. One copy should be retained in your files.

First Security Bank of Utah

By:/s/_____
Title

(Statement of Facts, ¶7.)[1] There was no further contact between the Credit Union and First Security regarding the account held at First Security by Renaissance Exchange, Inc. ("Renaissance"). (Statement of Facts, ¶10.) Furthermore, the trial court specifically found that this notice "did not contain any instructions directing First Security Bank to take action. The credit union was simply notifying First Security Bank that it had

[1]References to "Statement of Facts" refer to the Statement of Facts located on pages 5 through 10 of First Security's opening brief.

an interest in the certificate of deposit." (Addendum "A," ¶19.)[2]

In attempting to show that the notice was adequate, the Credit Union argues that notice under section 318(3) need only be "reasonable," and that what is reasonable depends on the facts and circumstances of each case. The Credit Union then argues that its notice was reasonable under the particular facts of this case.

First Security does not dispute that notice must be reasonable, and that reasonableness may be a function of the facts of the particular case. The Credit Union's rule of reasonableness, however, cannot write out of the law the requirement that the notice contain a direction that payment is to be made to the assignee. Even the cases cited in the Credit Union's brief contained a direction that payment be made. See, e.g., Hall Bros. Const. Co., Inc. v. Mercantile National Bank, 642 N.E.2d 285, 1994 WL 615303 (Ind. App. Nov. 9, 1994) ("until further notice, your payments due to the [account creditor/assignor] are to be made directly to the [assignee]"); Warrington v. Dawson, 798 F.2d 1533, 1534 (5th Cir. 1986) ("please indicate by signing below that you will make all checks payable on this account to [assignor] and [assignee]"); General Motors Acceptance Corp. v. Albany Water Board, 590 N.Y.S.2d 312, 313 (App. Div. 1992) ("Dealer authorizes and directs Purchaser to

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[2]References to "Addendum" refer to the addendum of First Security's opening brief.

make its checks in payment of the foregoing accounts payable to [assignee]"); Municipal Trust and Savings Bank v. Grant Park Community District Number 6, 171 Ill. App. 289, 525 N.E.2d 255, 256 (1988) ("[We] would collectively appreciate you making all checks due [assignor] payable jointly to [assignee] and [assignor]").

The only case without a direction that payment was to be made to the assignee was First National Bank v. Mountain States Telephone and Telegraph Co., 91 N.M. 126, 571 P.2d 118, 120 (1977), where the court held that no such direction was needed because the assignment at issue was an absolute assignment, as opposed to an assignment for collateral purposes. In First National Bank, the notice specifically advised the account debtor that the assignor retained no interest whatever in the account. It was unnecessary to tell the account debtor to pay the assignee because the assignee was now the only owner of the account. By contrast, in this case, the trial court found that the Credit Union merely advised First Security that it had an "interest in the certificate of deposit." (Addendum "A," ¶19.) The notice itself states that the assignment is for "collateral" purposes. Thus, Renaissance clearly retained an interest in the account, which triggers the requirement of a direction that payment be made to the Credit Union.

The Credit Union cites the following as the "particular facts" of this case that make its non-notice adequate: First Security's putting a hold on the account, America First's

possession of the Savings Certificate, and the fact that this is not an "indirect collection situation." Appellee's Brief, pp. 30-31. These facts clearly do not save the notice.

First, the fact that First Security set a "hold" on the account cannot serve as a substitute for proper notice. The Credit Union cites only one case for the proposition that the adequacy of notice may be affected by the account debtor's response. See Municipal Trust and Savings Bank v. Grant Park Community District Number 6, 171 Ill. App. 289, 525 N.E.2d 235 (1988). It clearly is not a majority position. Furthermore, the notice in Municipal Trust does contain a direction to pay the assignee:

> This is to notify you that we are working with the aforementioned company [assignor] and thus would collectively appreciate you making all checks due [assignor] payable jointly to [assignee and assignor] until notice is given to discontinue said practice.

525 N.E.2d at 256 (emphasis added). The notice contained an acknowledgement, which was signed by the account debtor: "I, the undersigned, hereby acknowledge the above and will comply with your request." Id. The court went on to hold that under the circumstances the notice fulfilled the requirement to "reasonably identify the rights of the assignee and reasonably demand payment to the assignee." Id. at 258. Municipal Trust in no way does away with the requirement that the notice contain a demand for

payment.[3] Since the Credit Union's notice indisputably contains no direction at all regarding payment, it fails.

Second, America First's possession of the Savings Certificate has nothing to do with any kind of notice to First Security. It may explain something concerning the knowledge of America First, but nothing about what America First told First Security.[4]

Third, the Credit Union's "indirect collection" argument is answered by Union Investment, Inc. v. Midland-Guardian Co., 30 Ohio App. 3d 59, 506 N.E.2d 271 (1986), where the court upheld the requirement of a demand for payment in a non-indirect collection situation.

None of the Credit Union's "facts" can change Section 318(3)'s fundamental requirement, confirmed in numerous cases cited in the briefs, that the notice contain a demand for payment. While the notice need not contain any specific "magic words," it must contain something. As the Utah Supreme Court stated in Time Finance Corporation v. Johnson Trucking Co., Inc., 23 Utah 2d 115, 458 P.2d 813 (1969),

> The fact, however, of such substitution of a new creditor must, in order to make the debtor liable to the assignee, be brought

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[3]Ironically, in post-trial briefing the Credit Union itself stated that an adequate notice must include a "demand certain," for payment, and made the preposterous claim that its notice made an "explicit" demand for payment. (Record at 234; Addendum "G," p. 10 n.2.)

[4]It should be noted that although the certificate stated that it would not be cashed unless presented, it also had clearly expired. (Statement of Facts, ¶¶11-12.)

> home to the debtor with much exactness and certainty before he has paid the debt. . . . He must pay to his original creditor when the debt is due, unless he can establish affirmatively that someone else has a better right. The notice to him, therefore, must be of so exact and specific a character as to convince him that he is no longer liable to such original creditor . . . .

458 P.2d at 876-77. The Credit Union's notice clearly fails this test because, as the trial court found, the notice contained no direction that First Security take any kind of action. Accordingly, the trial court erred in granting judgment against First Security.

II. THE TRIAL COURT ERRED IN FAILING TO MAKE FINDINGS ON THE ISSUE OF A CREDIT TO FIRST SECURITY.

The Credit Union misses the import of First Security's argument that it should have received a $19,096.03 credit, based on the consolidation of collateral derived from the pay-off of the Valley Bank loan. The purpose of the third and final loan to Renaissance was to pay off Valley Bank so that collateral could be consolidated at the Credit Union, thereby strengthening its position as a secured lender. (Statement of Facts, ¶18.) That purpose was fulfilled, but only because Renaissance withdrew the funds in its account with First Security, from which it derived the additional $19,096.03 necessary to pay off Valley Bank. (Statement of Facts, ¶¶16-18.)

The consolidation of collateral was a benefit to the Credit Union. In fact, it was the primary purpose of the loan. (Statement of Facts, ¶18.) It "purchased" that benefit with the extra $19,096.03, which Renaissance used to repay its loan from

Valley Bank. For that reason, First Security should have received a credit in that amount. At the least, the trial court should have supported his legal conclusions on this issue with adequate factual findings.

CONCLUSION

The trial court erred in holding that the Credit Union properly complied with Utah Code Ann. § 70A-9-318(3) because the Credit Union's notice contained no direction that payment was to be made to the Credit Union. The court also erred in holding that First Security is not entitled to a reduction in damages equal to the portion of the account proceeds which were used to fulfill the principal purpose of the loan and in failing to prepare adequate findings in support of its legal conclusions. Accordingly, the decision of the trial court should be reversed and judgment entered in favor of First Security. In the alternative, judgment should be vacated and the case should be remanded for further findings.

DATED this 30 day of December, 1994.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS was mailed, postage-prepaid, on this 30 day of December, 1994, to the following:

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